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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of MARIE A. TYLER and
PHILLIP GARCIA.

MARIE A. TYLER-GARCIA,

Appellant,

v.

PHILLIP GARCIA,

Respondent.

G040071

(Super. Ct. No. 01D009552)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard G. Vogl, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Hughes and Sullivan, Bruce A. Hughes and Lisa Hughes for Appellant.

William J. Kopeny & Associates and William J. Kopeny for Respondent.

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Marie A. Tyler-Garcia challenges the trial court's modification of a stipulated child support order. The previous order required Marie's ex-husband, Phillip Garcia, to pay \$10,000 per month in child support and recited a finding that it was in the children's best interest for Marie not to work or have income imputed to her.¹ After entry of the previous order, however, Phillip lost his job and was unable to secure new employment. Phillip then requested the court to modify the support order and impute income to Marie. The trial court granted the motion, imputing \$6,000 in income to Marie and changing the support order to require Phillip to pay, in lieu of a set amount, 18 percent of any income he may receive.

Marie challenges the trial court's ruling, contending, inter alia, the trial court erred in imputing \$6,000 income to her. Marie asserts that imputing income to her violated the parties' prior stipulation, lacks evidentiary support, and is not in the children's best interest.

We conclude the evidence did not support the imputation of \$6,000 in income to Marie. The trial court simply accepted the bald estimate of Marie's earnings included in Phillip's income and expense declaration. Phillip failed to introduce evidence showing Marie possessed the skills or job experience to earn \$6,000 per month, or that employment opportunities existed that would pay her that amount. Accordingly, we reverse and remand for further proceedings.

I

FACTUAL AND PROCEDURAL BACKGROUND

Phillip and Marie married in 1988 and divorced in 2004. In 2005, Marie filed an order to show cause seeking modification of spousal and child support. On

¹ We refer to Marie and Phillip by their first names for clarity and ease of reference, and intend no disrespect. (See *In re Marriage of Olsen* (1994) 24 Cal.App.4th 1702, 1704, fn. 1.)

September 6, 2005, the trial court entered its judgment on reserved issues, and based its child support award largely on the agreement of the parties. The stipulated support order recognized the support guideline amount fell between \$5,500 and \$7,500 per month, but set monthly child support at \$10,000. The order further provided that the support order “[c]annot be modified downward unless there is a material change of circumstances in [Phillip]’s financial circumstances such that [Phillip]’s income is materially less than \$37,500 per month, or [Marie] earns materially in excess of \$20,000 per month.”

The 2005 order recognized Marie as the primary custodial parent with an eighty percent time share, and also provided: “The parties agree and the Court finds that absent a material change of circumstances the Court is without jurisdiction to reduce [Phillip]’s child support obligation and that said amount stipulated to by the parties, is part and parcel of a fair and efficient settlement of all conflicts between the parties and to minimize the need for litigation. The parties contemplate that [Marie], during each child’s minority, shall not be ‘required’ to work. The parties agree and the court finds that it is in the best interests of the children that [Marie,] now or at any time during the children’s minority not be imputed with an ability to earn.”

At the time of the parties’ divorce, Phillip was employed as a senior vice president of New Century, a mortgage company. In 2006, the year after the stipulated support order, Phillip earned in excess of \$1 million, including salary, bonuses, dividends, interest, and capital gains. In April 2007, however, New Century filed for bankruptcy protection, and Phillip’s employment was terminated in June 2007. Phillip estimates that as a result of New Century’s bankruptcy, he has lost in excess of \$4 million in stock, stock options, long-term incentives, and deferred compensation. That same month, Phillip obtained employment as a senior vice president with Countrywide, earning approximately \$35,400 per month. In October 2007, Countrywide terminated Phillip’s employment. Despite extensive efforts, Phillip remains unemployed.

In October 2007, Phillip filed an order to show cause (OSC) seeking to modify the child support order. In his declaration, Phillip requested a guideline support calculation that includes Marie's earning capacity, noting she "is forty-two years old, in good health and is able to earn an income to assist with the support of our children." In an income and expense declaration later filed in support of the OSC, Phillip estimated Marie's gross monthly income to be \$6,000, but included no explanation of how he arrived at this figure. Phillip's income and expense declaration listed among his own assets \$95,000 in cash and checking, savings, credit union, money market, and other deposit accounts, and \$400,000 in "other property."

The court issued an interim order, reducing [Phillip]'s child support from \$10,000 per month to \$1,069 per month, commencing on December 1, 2007, until the hearing on the OSC. The court noted it had received no responsive papers from Marie when the court submitted the matter, and ruled solely on the materials Phillip provided.² The court found that Phillip and Marie had "an equal earning capacity," and that Phillip's \$95,000 in various accounts could reasonably generate \$475 per month in interest. The court also noted that Phillip could invade the \$400,000 in "other property" listed on his income and expense statement to make payments for medical insurance, realty interest, and taxes. As to its child support ruling, the court determined: "Based upon the evidence presented, the court makes the findings regarding gross monthly income, actual federal income tax filing status, deductions from gross income, net monthly disposable income, percentage of time each parent has primary physical custody, and amount of support which would be received under the statewide child support formula for each child, as stated on the attached DissoMaster Required Findings document here attached." The

² The court took the matter under submission for its interim ruling on December 7, 2007. That same day, Marie filed her responsive declaration. The court issued its interim ruling on December 11, 2007.

attached DissoMaster report reflected the court used \$6,000 as the income of both Phillip and Marie.

Marie filed a responsive declaration stating she is self-employed as a personal trainer, working 12 hours per week and earning \$266 per month. She listed among her assets \$10,000 in cash and checking, savings, credit union, money market, and other deposit accounts, \$90,000 in stock, bonds and other liquid assets and \$400,000 in “other property.” Marie estimated Phillip’s gross monthly income to be “\$1,000,000+” from “stock options etc.”

The court held the hearing on the OSC on January 8, 2008, and entered its decision a week later. The court determined that nothing in the stipulated support order prevented it from imputing income to Marie, explaining: “This court finds that it would be in the children’s best interest if they had more money, rather than less. [Marie] is able to provide this ‘more money’ by her becoming employed” because Marie becoming employed would mean there would be more money to support the children. “Her employment in a daytime job should not unreasonably interfere with her time with the children as they are both in school during the day. [¶] No declaration of [Marie] has rebutted the Dec. 3, 2007, allegation of [Phillip] that [Marie] has an earning capacity of \$6,000 monthly. The court will impute that sum to her.” The court referenced the December 11 DissoMaster report, and ordered Phillip to pay as child support 18 percent of all sums he may receive in the future from a various specified sources.³ Marie now appeals the trial court’s judgment.

³ The order stated it was effective “February 1, 2007.” During oral argument, Marie’s counsel noted this date appeared to be a typographical error, and should have read “February 1, 2008.” Although the effective date clearly appears to be a typographical error, the issue is moot given our disposition of the case.

II

DISCUSSION

A. *The Trial Court Did Not Err in Deviating From the Parties' Prior Agreement*

Marie contends the trial court erred by modifying the support order when it implicitly determined Marie should seek employment to help support the children and therefore imputed income to her. We disagree.

The support order does not prevent a subsequent modification based upon a material change of circumstances. The provision at issue read: “The parties agree and the Court finds that absent a material change of circumstances the Court is without jurisdiction to reduce [Phillip]’s child support obligation and that said amount stipulated to by the parties, is part and parcel of a fair and efficient settlement of all conflicts between the parties and to minimize the need for litigation. The parties contemplate that [Marie], during each child’s minority, shall not be ‘required’ to work. The parties agree and the court finds that it is in the best interests of the children that [Marie,] now or at any time during the children’s minority not be imputed with an ability to earn.”

Accordingly, the support order expressly allows a reduction of Phillip’s support obligation based upon “a material change of circumstances.” Phillip produced evidence he lost his positions at New Century and Countrywide, and has not been able to secure new employment despite diligent efforts to find work. Moreover, Phillip demonstrated he lost most of his other assets, including stock, stock options, and deferred compensation, when New Century went bankrupt. Clearly, this constitutes a material change in circumstances.

Moreover, the statement that “[t]he parties contemplate that [Marie], during each child’s minority, shall not be ‘required’ to work,” does not equate to a *prohibition* of any kind, but only describes the parties’ *contemplation*. Undoubtedly, the parties did not

contemplate the near-demise of the residential lending industry following the bursting of the housing bubble when they agreed to the 2005 support order.

Finally, the statement that “[t]he parties agree and the court finds that it is in the best interests of the children that [Marie,] now or at any time during the children’s minority not be imputed with an ability to earn,” can be read in two ways. One interpretation is that it always will be in the children’s best interests for Marie not to have income imputed to her at any time during their minority, regardless of any change of circumstances. Alternatively, it can be read to mean that under present circumstances, it is in the children’s best interests for Marie not to have income imputed to her at any time during their minority. We view the second interpretation as the more reasonable, because the first presumes the parties and the court could foresee and consider every possible change in circumstances in determining the children’s best interests, a task which is impossible.⁴

Even if, however, we interpreted the provision as an absolute bar to imputing income to Marie during the children’s minority, it would not prevent the trial court from doing so. The question whether the parties may stipulate that a child support order is nonmodifiable was addressed in the recent case of *In re Marriage of Alter* (2009) 171 Cal.App.4th 718. There, the parties’ marital settlement agreement included a child support provision requiring the husband to pay \$4,000 per month, and specifying this amount was “absolutely non-modifiable downward.” (*Id.* at p. 722.) The court, however, upheld a downward modification of the support amount based on a change in the husband’s income. The court relied in part on Family Code section 3651, subdivisions (a) and (e),⁵ which provide that “a support order may be modified or

⁴ It is not even entirely clear that this agreement, incorporated as a part of a paragraph devoted entirely to the support of the children, is not governed by the “absent a material change of circumstances” phrase included at the beginning of that paragraph.

⁵ All statutory references are to the Family Code.

terminated at any time as the court determines to be necessary,” “whether or not the support order is based upon an agreement between the parties.” The court also took note of section 3651, subdivision (d), which prohibits modification of a spousal support order based upon the parties’ agreement that “spousal support is not subject to modification or termination.” Applying the maxim of statutory construction, *expressio unius est exclusio alterius*, the court determined that by expressly allowing parties to specifically prohibit modification of *spousal* support orders, the Legislature intended to preserve the court’s power to modify *child* support orders, even where the parties expressly provide otherwise. (*Alter*, at p. 727.) Accordingly, the court concluded that “[t]he trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties’ agreement to the contrary.” (*Id.* at p. 722.) We agree.

Marie contends her situation is different because the support order here did not prohibit downward adjustment of the support amount, but prohibited only the imputation of income to her during the children’s minority. But “[p]arents do not have the power to agree between themselves to abridge their child’s right to support. [Citation.]’ [Citation.] That is because ‘the law puts the child’s interests before the contractual expectations of the parents. Courts will not respect agreements that have the effect of contracting away the child’s right to support. [Citations.]’” (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 294.) Where Phillip is out of work and unable to secure employment, a contract absolving Marie of any duty to provide the children financial support can only be interpreted as “contracting away” the children’s right to financial support. In sum, we conclude the parties’ prior stipulated support order did not preclude the trial court from imputing income to Marie based on a material change of circumstances.

B. *The Evidence Does Not Support the Trial Court's Decision to Impute to Marie Income of \$6,000 Per Month*

The trial court is not limited to a parent's actual income when setting child support. (*In re Marriage of Destein* (2001) 91 Cal.App.4th 1385, 1391.) Section 4058, subdivision (b), provides: "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." Under section 4058, "Earning capacity is composed of (1) the ability to work, including such factors as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work exemplified through good faith efforts, due diligence and meaningful attempts to secure employment; and (3) an opportunity to work which means an employer who is willing to hire. [Citations.] [¶] . . . When the ability to work or the opportunity to work is lacking, earning capacity is absent and application of the standard is inappropriate. . . ." (*In re Marriage of Smith* (2001) 90 Cal.App.4th 74, 81-82 (*Smith*).)

"The 'opportunity to work' exists when there is substantial evidence of a reasonable "likelihood that a party could, with reasonable effort, apply his or her education, skills and training to produce income.' [Citation.] 'Figures for earning capacity cannot be drawn from thin air; they must have some tangible evidentiary foundation.' [Citation.] 'To calculate support based on the hypothetical procurement of a job which the evidence showed was not available to [the parent] would effectively write the "opportunity" element of earning capacity out of existence.'" (*Smith, supra*, 90 Cal.App.4th at p. 82.) The party seeking the imputation of income to the nonworking parent bears the burden of offering competent evidence of the nonworking parent's qualifications, earnable salary, and job opportunities. (*In re Marriage of Henry* (2005) 126 Cal.App.4th 111, 120.) The proponent need *not*, however, demonstrate the nonworking spouse's application for work would have secured the employment. Once the proponent meets his or her burden, the nonworking spouse, to defeat imputation, must

demonstrate he or she either lacked the ability to find employment or, despite reasonable efforts, had no reasonable opportunities to obtain employment at the level imputed. (*In re Marriage of Eggers* (2005) 131 Cal.App.4th 695, 701.)

Marie contends Phillip failed to introduce sufficient evidence of her qualifications, salary, and job opportunities to support imputation of a \$6,000 monthly salary to her. We agree.⁶

In its order, the trial court cited the following as the reason it imputed \$6,000 in income to Marie: “No declaration of [Marie] has rebutted the Dec. 3, 2007, allegation of [Phillip] that [Marie] has an earning capacity of \$6,000 monthly. The court will impute that sum to her.” Given that Phillip had provided no explanation for the \$6,000 income figure in his income declaration, we have no evidence or information suggesting how Marie could earn \$6,000 per month. A review of all of the evidence before the court provides no further insight. Marie’s declaration demonstrates she was earning \$266 per month as a personal trainer working 12 hours a month. Her declaration also states she was 42 years old and has a Bachelors of Arts degree. Nothing suggests what field of study her degree is in, nor what previous work experience she may have had. Moreover, no evidence suggests job openings in any field in which Marie has experience, nor the salary such positions would yield. In sum, from the record it appears the \$6,000 earning capacity was “drawn from thin air.” (*Smith, supra*, 90 Cal.app.4th at p. 82.) Accordingly, we must reverse the trial court’s ruling and remand for further proceedings.

⁶ Phillip urges us to reject Marie’s sufficiency of the evidence claim because she failed to fairly summarize all of the material evidence admitted at trial. (See *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) In view of the limited size of the record, we will exercise our discretion to consider her claims. We also deny Phillip’s motion to strike Marie’s opening brief and for sanctions for failing to include record citations throughout her brief.

Marie also contends that imputing income to her in any amount would not be in the children's best interests because she is the primary custodial parent, and that her current self-employment allows her flexibility to care for the children. These are certainly factors the trial court may consider in determining the best interests of the children when exercising its discretion to impute income to a custodial parent. But under California law, "Both parents are mutually responsible for the support of their children." (§ 4053, subd. (b).) Nothing in the law categorically exempts a custodial parent from income imputation. (See *In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1340; *In re Marriage of Paulin* (1996) 46 Cal.App.4th 1378, 1384-1385.) But whether imputing income to Marie would be in the children's best interests may in part turn on the amount of income she could earn. Because we reverse for lack of evidence supporting the amount imputed to Marie, the trial court must reconsider whether the amount of imputed income affects the children's best interests based on the evidence presented.

Finally, Marie contends the trial court had no basis for imputing \$6,000 in income to Phillip and in departing from the support guidelines without making the necessary findings supporting the departure. Given our disposition of the case, Marie may raise these issues in the trial court on remand.

III

DISPOSITION

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion. Each side is to bear their own costs of this appeal.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.